NTSB Order No.
EM-47

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 15th day of October 1975.

OWEN W. SILER, Commandant, United States Coast Guard,

vs.

JOSEPH C. LEROY, Appellant.

Docket ME-47

OPINION AND ORDER

The appellant, Joseph C. Leroy, has appealed from the decision of Administrative Law Judge Charles J. Carroll, Jr.,[1] which revoked his Merchant Mariner's Document No. Z-436785064-D1, and all other seaman's documents, for misconduct aboard ship. The law judge found that on October 2, 1974, appellant, while serving under authority of his documents as a fireman/watertender aboard the SS JEFF DAVIS, a merchant vessel of the United States, had assaulted the Third Assistant Engineer by threatening him with a burner barrel and by using foul and abusive language; that on October 10, 1974, appellant had wrongfully failed to perform his duties by leaving the fireroom and going to the shaft alley to sleep; that on October 26, 1974, appellant had been reading on watch; and that on October 26, 1974, appellant had interfered with and directed foul and threatening language to the Second Assistant Engineer. The law judge further found that appellant had received adequate notice of the time and place of the hearing and that, therefore, the hearing was properly conducted in his absence, under the authority of 46 CFR 5.20-25.[2] He concluded that the actions of appellant

[1]A copy of the law judge's decision is attached.

[2]This section provides, in pertinent part, as follows:
"§5.20-25 Failure of person charged to appear at hearing.
(a) In any case in which the person charged, after being duly served with the original of the notice of the time and place of the hearing and the charges and specifications, fails to appear at the time and place specified for the hearing, a notation to that effect shall be made in the

"constituted a continuing pattern of misconduct with accompanying serious breaches of shipboard discipline" and that "the presence of such a person aboard vessels of the United States Merchant Marine is inimical to the statutory duty of the United States Coast Guard to promote safety of life at sea." [3] He thereupon ordered the revocation of all licenses and documents issued to appellant by the Coast Guard.

The appellant originally appealed the decision of the law judge to the Commandant, as provided in 46 U.S.C. 239(g).[4] However, the Commandant did not render a decision affirming, reversing, altering, or modifying the decision of the law judge. Instead, pursuant to section 5.30-3(b)(1) of the Coast Guard's Regulations for Suspension and Revocation Proceedings (46 CFR 5.30-3(b)(1)),[5] the Chief Counsel of the Coast Guard, by letter

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record and the hearing may then be conducted 'in absentia.'"

[3]Decision, p.10.

[4]46 U.S.C. 239(g) provides, in pertinent part, as follows:

* * * * * *

(g)In any investigation of acts of incompetency or misconduct or of any act in violation of the provisions of title 52 of the Revised Statutes or of any of the regulations issued thereunder, committed by any licensed officer or any holder of a certificate of service, the person whose conduct is under investigation shall be given reasonable notice to the time, placed and subject of such investigation and an opportunity to be heard in his own defense.... The person whose license or certificate of service is suspended or revoked may, within thirty days, appeal from the order to the Commandant of the Coast Guard. On such appeal the appellant shall be allowed to be represented by counsel. The Commandant of the Coast Guard may alter or modify any finding of the investigation, but the decision of the Commandant shall be based solely on the testimony received by the said investigation and shall recite the findings of fact on which it is based."

[5]Section 5.30-3(b) provides as follows:

"§5.30-3 Time in which to complete appeal.

* * * * * *

(b)Prior to the expiration of the applicable 60-day period of [sic] extension thereof as set forth in paragraph (a) this section at least one ground for appeal or exception to the administrative law judge's decision must be filed in

of March 21, 1975, notified appellant's counsel that the proceeding was "terminated," and that the order of the law judge would constitute the "final agency action" on the merits of the case.[6] The appeal to this Board followed, in which appellant contends that he had not received due process in this proceeding.

This matter reaches the Board in a somewhat unusual form. Neither party fully briefed either the procedural or substantive merits of the case.[7] Several documents have been filed, however, with respect to the jurisdiction of the Board to hear this appeal. The Commandant has, by letter, submitted a motion to dismiss, and the appellant has filed a memorandum in opposition to this motion. The Commandant has submitted a further reply to this memorandum.

Upon consideration of the entire record, the Board has determined that it does have jurisdiction to hear this appeal. With respect to the merits, we further conclude that appellant did not receive the full and hearing to which he is entitled under the provisions of 46 U.S.C. 239(g) and the Administrative Procedure Act.[8] Therefore, we shall remand the proceedings to the

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support of the notice of appeal. Failure to do so will result in one of the following:

(1)Termination of the case by written notice to the appellant or his counsel, that the decision of the administrative law judge constitutes the final agency action on the merits of the case; or,

(2)Consideration of the appeal on the merits of the case and publication of the Commandant's decision without prior notice to the appellant or his counsel. This will only be done when some clear error appears in the record or when the case presents some novel policy consideration."

[6]A copy of the Chief Counsel's termination letter is attached.

[7]We have determined that appellant's notice of appeal, which contains the information required by section 425.20(b) of the Board's Rules of Procedure for Merchant Marine Appeals (14 CFR 425.20(b)), satisfies the requirement set out in 14 CFR 425.20(a) that a brief or memorandum in support of the appeal must be filed.

[8]5 U.S.C. 551 et seq. The Administrative Procedure Act has been specifically held to govern Coast Guard revocation and suspension proceedings. Van Teslaar v. Bender, 365 F. Supp. 1007 (D.C. Md. 1973). Cf. O'Kon v. Roland, 247 F. Supp.743 (S.D.N.Y.

Commandant so that he may further remand the matter to an administrative law judge, with directions to reopen the hearing in New Orleans, Louisiana, so that appellant may present his defense to the charges brought against him.

The Board's jurisdiction in this proceeding is derived from former section 5(b)(2) of the Department of Transportation Act.[9] The Board delegated certain functions assigned to it under that section to the Commandant,[10] but retained the authority "to review decisions of the Commandant on appeals from orders of [administrative law judges] revoking licenses, certificates, documents, or registers...."

The thrust of the Commandant's argument is that, under the applicable regulations,[11] the Board's jurisdiction is limited to the review of "decisions" entered by the Commandant.[12] He asserts

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1965).

[9]49 U.S.C.1654(b)(2). This section provided as follows:

Sec.5 National Transportation Safety Board

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(b) There are hereby transferred to, and it shall be the duty of the Board to exercise the functions, powers, and duties transferred to the Secretary by sections 6 and 8 of this Act with regard to--

* * * * * *

(2) reviewing on appeal the suspension, amendment, modification, revocation, or denial of any certificate or license is sued by the Secretary or by an Administrator."

This section has been deleted, effective April, 1975, from the Department of Transportation Act by section 308(1) of the Independent Safety Board Act of 1974 (Pub. L. 93-633, 88 Stat. 2156) ("Act"), but the Board's appellate jurisdiction in Coast Guard suspension and revocation proceedings has been continued, in substantially the same form, by section 304(a)(9)(B) of the Act.

[10]14 CFR 400.43(a)(2). Effective April, 1975, this delegation was discontinued, as it is no longer authorized by statute.

[11]This proceeding is governed by the rules of procedure formerly set out at 14 CFR Part 425. Proceedings on appeals from decisions, on or after April 1, 1975, of the Commandant are governed by the rules currently set out at 49 CFR Part 825.

[12]See former sections 425.1 and 425.5 of 14 CFR Part 425.

that since the March 21 termination letter "does not constitute an appellate decision of the Commandant but merely closes the case for lack of a perfected appeal, "the Board may not act.

We need not here decide whether the termination letter procedure satisfies the requirements of 46 U.S.C. 239(g).[13] Assuming that this procedure is valid, the notification contained in the March 21, 1975, letter from the Chief Counsel[14] must be viewed as essentially a denial of the appeal and an adoption by the Commandant of the law judge's decision.

The procedural rule authorizing the termination of an appeal in this manner was promulgated by the Coast Guard several years before the creation of the National Transportation Safety Board.[15] Prior to the entry of the Board into this field, a determination by the Commandant (or the Chief Counsel) to terminate a case by letter could not possibly affect the appellate rights of a seaman whose documents were revoked, since such letter identified the law judge's decision as the "final agency action" on the case, and thus made available judicial review of the Coast Guard's order in a United States District Court pursuant to the Administrative Procedural Act.[16] In establishing the Board, and in endowing it with the duty of reviewing certain agency adjudications on appeal, Congress clearly did not intend to create distinct appellate remedies whose availability would be determined by the form of procedure during the early stages of the proceeding. The ends which are achieved through Board review of adjudicatory orders are equally applicable to those proceedings in which the order of an administrative law judge constitutes the final agency as to those in which the Commandant issues a separate decision sustaining a

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[13]The statute appears to contemplate a "decision" after appeal to the Commandant, so long as the appeal process is commenced within 30 days of the law judge's order. There is no statutory analogue to the requirement in the regulations that appeal be technically perfected by filing specific grounds for appeal.

[14]46 CFR 5.30-3(b)(1) does not specifically indicate who is to be the author of the termination letter. We are not aware of any delegation of authority to perform this function from the Commandant to the Chief Counsel. See 46 CFR 1.10(d).

[15]This provision first become effective in 1962 as former section 137.30-3(b)(1) of title 46 CFR. (See 27 F.R. 9863, Oct.5, 1962.)

[16]5 U.S.C. 704.

prior order.

With respect to the merits of appellant's due process claim, the record reveals that the charge against him was served at 4:00 a.m. on November 18, 1974, and was made returnable at 2:00 p.m. on November 20, 1974, in San Francisco, California. Appellant was properly advised of his rights at the time of service. Shortly before 9:00 a.m. on November 18, the matter came before the law judge for a preliminary hearing addressed to appellant's request for a change of venue to New Orleans, Louisiana. At that time, appellant stated that he could not afford to remain in San Francisco until the completion of the hearing and that the witnesses who would testify on his behalf had already departed for New Orleans.

In light of the fact that the Coast Guard's two witnesses were from Massachusetts and Texas, the law judge determined that their testimony should be taken as scheduled in San Francisco. However, he informed appellant that after their testimony was received, the matter could be transferred to New Orleans, where the hearing could be completed.[17] He stated that respondent should be present to cross-examine the Coast Guard's witnesses, that respondent should attempt to retain counsel through his union, and that the hearing possibly could be expedited.[18] He added that if appellant was not present for the hearing, the matter would proceed "in absentia."[19] The hearing was thereupon adjourned.

When the hearing reconvened on November 20, respondent did not appear. Counsel for the Coast Guard reported that he had received a message that appellant had tried to reach him by telephone during the interim, but that when he returned the call, appellant could not be contacted. The law judge then determined to proceed "in absentia, "heard the evidence presented by the Coast Guard, found the charge of misconduct proved, and closed the hearing. On December 12, 1974, the law judge issued his decision and order revoking appellant's documents.

We do not question the power of the Coast Guard, in the context of suspension and revocation proceedings, to hold a hearing while the accused individual is not present. However, the due

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[17]Tr. 7, 10.

[18]Tr. 12, 13.

[19]Tr. 14. Neither the precise meaning of the term "in absentia" nor the precise consequences of such a procedure were explained to appellant.

process guarantees set out in 46 U.S.C. 239(g) and in the Administrative Procedure Act must also be observed.

In this matter, all proper procedures were taken with respect to notifying appellant of the charges against him and of his rights and obligations with respect to the hearing. However, there was some confusion as to the precise status of the proceeding at the time of the adjournment of the November 18 preliminary hearing. Although the law judge did refer to the possibility of proceeding "in absentia" if appellant did not reappear, the entire thrust of the proceedings during the preliminary hearing indicated that appellant would have the opportunity to present witnesses and evidence in New Orleans at some later date.[20] We find that it was reasonable for appellant, who was not represented by counsel at the time, to have concluded that his nonappearance on November 20 would only affect his right to cross-examine the witnesses for the Coast Guard.

In light of these circumstances, we find that appellant was improperly denied the opportunity to be heard on the merits and to present a defense to the alleged misconduct.[21]
We, therefore, set aside the order of the law judge (as adopted by the Commandant) and remand the matter to the Commandant so that he may further remand the proceeding to an Administrative Law Judge[22]

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[20]This appears to be the interpretation of counsel for the Coast Guard, who stated, upon the resumption of the hearing, that:

"When we convened Monday, we were going to try to have a change of venue, I think the plan was, and just take the Coast Guard witnesses as depositions and then have it transferred to New Orleans" (Tr.18).

[21]In the March 21, 1975 termination letter, the Chief Counsel stated that:

> "Had (appellant) made a proper motion for a change of venue...then a transfer of the hearing could have been arranged. Since the Appellant neither made such a motion nor appeared, the hearing, proceeded in absentia...to a final decision."

However, as noted above, the record indicates that such a motion was made to the law judge on November 18.

[22]Cases under the Administrative Procedure Act have held that where, as in this case, the observation of the demeanor of witnesses may be crucial to the making of credibility determinations, a substitution of law judges without a de novo hearing should be avoided. Gamble-Skogmo, Inc. v. Federal Trade

with directions to reopen the hearing in New Orleans, Louisiana. At this hearing, appellant shall be permitted to present his defense to the charges brought against him.

ACCORDINGLY, IT IS ORDERED THAT:

1. Appellant's appeal be and it hereby is granted in part;[23] and denied in part;

2. The revocation order of the law judge, which became final agency action pursuant to the termination letter of March 21, 1975, be and it hereby is set aside; and

3. The entire proceeding be and it hereby is remanded to the Commandant so that he may further remand the matter to an Administrative Law Judge of the Coast Guard for action not inconsistent with this opinion.

REED, Chairman, McADAMS, BURGESS, and HALEY, Members of the Board, concurred in the above opinion and order. THAYER, Member, absent, not voting.

(SEAL)

Commission, 211 F.2d 106 (8 Cir. 1954); Van Teslaar v. Bender 1007, 1012 (D. Md. 1973). See also 2 Davis, Administrative Law Treatise, §11.18, and cases cited. Therefore, if possible, Administrative Law Judge Carroll should be assigned to this proceeding on remand. However, if such assignment should prove to be impracticable, the transcript of the testimony taken at the original hearing may be considered by the new law judge without requiring the recall of the Coast Guard's witnesses, since appellant, in requesting that there be a change of venue after the presentation of the Coast Guard's case-in chief, may be considered to have waived any right he might have had to object to such a procedure.

[23]In his notice of appeal, appellant also requested that he be granted clemency and that his documents be restored to him. We do not reach these issues at this time.